United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- HUMBERTO FLORES, Appellant.	Docket No. 74-2249

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

WILLIAM EPSTEIN,

Of Counsel

3

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In its brief on appeal, the Government argues that this Court should now consider the efficacy of the June 28, 1973 oral notice of readiness. Although appellant asserts that the Government's failure to raise this point on the first appeal to this Court, and on the Government's motion for an extension of time in which to file for rehearing should forever preclude their reliance on it, appellant also asserts that, should this Court consider the

June 28th oral notice issue on the merits, the oral notice was inadequate compliance in this case with Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases.

Here, because the Government relied on the written notice following the District Court's finding that the July 24th written notice constituted compliance with Rule 4 (Memorandum and Order of Judge Costantino, October 15, 1973) and the continued reliance on that fact finding by the Government until the morning of the October 1, 1974 remand hearing, the Government is chargeable with the "wasteful procedure[s]" condemned in United States v. Pierro, 478 F.2d. 386, 388(2d. Cir. 1973), and United States v. Favaloro, 493 F.2d. 623, 624(2d. Cir. 1974,) and should thus be precluded from relying upon a notice procedure that they themselves took no "notice" of until the issue had been conclusively litigated.

By filing a written notice of readiness, after giving what is now claimed to have been effective oral notice, and by relying upon that written notice throughout the appellate proceedings, the Government was merely following preferred notification procedures:

> The better practice, in those districts with heavy calendars, is to file a written notice with the clerk of the Court for the judge's attention, and to serve a copy on the defendant.
>
> (United States v. Pierro, supra, 478 F. 2d at 389).

In fact, in Pierro, this Court noted with approval the decision of the Eastern District United States Attorney's office to issue written notices in all cases:

> The United States Attorney's Office for the Eastern District has sensibly adopted the practice of issuing a written notice of readiness in virtually all cases and we have been assured that this practice will be continued in the future.
>
> (Id., at 388-89)

By filing a formal written notice of readiness as is virtually required by Pierro and Favaloro, and by leading appellant and this Court to believe that that notice controlled the Rule 4 issue in this case, the Government must have believed that the written notice was the only form of notice which satisfied Rule 4. The Government thus finds itself in the untenable position of asserting that appellant and this Court should have relied on an oral procedure that they themselves failed to rely on or even remember.

The Government purposefully abandoned the oral notice theory following the District Court's ruling on appellant's original motion to dismiss the indictment, which signifies that they too believed the written notice to have been the effective notification. Clearly, the Government cannot now change its theory of the case as previously presented to this Court, merely because their theory of the efficacy of the written notice was rejected by the Court.

CONCLUSION

For the foregoing reasons, and for the reasons asserted in appellant's principal brief on appeal, the judgment of the District Court entered on October 21, 1974 should be vacated, and the indictment dismissed.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007

WILLIAM EPSTEIN,

Of Counsel

November 18, 1974

Certificate of Service

November 18, 1974

I certify that a copy of this reply brief has been mailed to the United States Attorney for the Eastern District of New York.